(2)

No. 89-1593

In the Supreme Court of the United States

OCTOBER TERM, 1989

CARL E. MCAFEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 5311 *et seq.*, and the regulations promulgated thereunder, prohibit structuring transactions in order to cause a financial institution to fail to file Currency Transaction Reports.

2. Whether petitioner was denied his right to due process of law by a juror's failure to disclose a past personal relationship with an Assistant United States Attorney other than the prosecutor who tried petitioner's case.

3. Whether the district court properly excluded testimony that a reasonably prudent attorney would have given the same advice regarding structuring cash transactions that was given by petitioner.

4. Whether petitioner is entitled to a new trial because of prosecutorial misconduct.

5. Whether the evidence was sufficient to support petitioner's convictions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38) is unpublished, but the decision is noted at 896 F.2d 1368 (Table). The prior opinion of the court of appeals reversing the dismissal of two counts of the indictment (C.A. App. 68-70) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990. The petition for a writ of certiorari was filed on April 12, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of being an accessory after the fact to several drug-related offenses, in violation of 18 U.S.C. 3; traveling in interstate commerce to facilitate a narcotics business, in violation of 18 U.S.C. 1952; concealing a material fact in a government matter, in violation of 18 U.S.C. 1001; and causing a financial institution to fail to file a Currency Transaction Report (CTR), in violation of 31 U.S.C. 5313 and 5322(a). He was sentenced to 15 months' imprisonment on the accessory count, to be followed by a three-year term of probation on the remaining counts.

1. The evidence at trial, which is summarized in the court of appeals' opinion (Pet. App. 4-12), showed that petitioner, an attorney, assisted the wife of a drug trafficker to conceal assets derived from her husband's drug trafficking business in order to protect them from being forfeited to the government.

Wallace Thrasher was an importer of marijuana. After his marijuana-loaded plane crashed on October 17, 1984, Thrasher went into hiding. When the police found the wreckage, Thrasher's wife, Olga, told police her husband was on a business trip. She retained Max Jenkins to represent her husband and herself in any criminal proceedings.

Olga Thrasher was later informed that her husband had died in a plane crash on the way to Belize, where he had intended to explain the first plane crash to his suppliers and obtain another load of marijuana. Jenkins suggested that they confirm Wallace Thrasher's death and contact petitioner, an attorney experienced in dealing with foreign governments. Pet. App. 4-6.

Olga Thrasher subsequently told petitioner about her husband's drug smuggling business and advised him that most of their property had been purchased with drug pro-

ceeds. Petitioner told her it was possible that her property would be seized, and he suggested that it would improve her position to obtain a death certificate for her husband. They were unsuccessful in obtaining more information about Wallace Thrasher's supposed death.[1]

In January 1985, Olga Thrasher was subpoenaed by a federal grand jury in Roanoke, Virginia, to produce evidence of her husband's death, including a death certificate. Petitioner suggested that they obtain a false death certificate in Jamaica. Together with Jenkins and Olga Thrasher, petitioner subsequently flew to Jamaica to obtain two copies of a false certificate listing the cause of death as a "tragic accident." Jenkins and petitioner each kept a copy of the certificate. At petitioner's direction, Olga Thrasher exercised her Fifth Amendment right not to testify before the grand jury, and the death certificate was not mentioned. Also at petitioner's direction, Olga Thrasher later used the death certificate in purchasing a house in Florida and to support a claim on her husband's life insurance policy. Pet. App. 6-7, 10-11.

Petitioner advised Olga Thrasher in connection with her purchase of a condominium in Wytheville, Virginia, for $85,000 cash. He told her any newly acquired property might be subject to seizure by the government and suggested that she obtain a loan or form a corporation to buy the condominium. Petitioner advised her that if she converted the money into cashier's checks she should purchase them in amounts of less than $10,000 each at different branches of several banks to avoid the requirement that the bank file a Currency Transaction Report for a cash

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[1] Petitioner admitted at trial that he never believed Wallace Thrasher was dead. C.A. App. 923.

transaction in excess of $10,000.[2] On December 13, 1984, Olga Thrasher and her housekeeper purchased ten cashier's checks for less than $10,000 each using different branches of three banks. Sovran Bank and Bank of Virginia realized that the purchases involved a total of more than $10,000 in a single day and filed CTRs; the Bank of Speedwell, however, did not file a form. Olga Thrasher then used the cashier's checks to pay for the condominium. Pet. App. 8-10.

Olga Thrasher also wanted to have an airplane overhauled and to have it fitted with long-range full tanks so that it could be used for future drug shipments. Petitioner,

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[2] Under federal law, a financial institution is required to file a CTR whenever a customer makes a currency payment in excess of $10,000. 31 U.S.C. 5313 (formerly 31 U.S.C. 1081, 1082, 1083 (1976)); 31 C.F.R. 103.22(a) (1982).

Section 5313(a) (31 U.S.C.) provides in relevant part:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency * * * in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

Section 103.22(a) (31 C.F.R. (1982)) provides:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

Each Currency Transaction Report form contained the following provision (Treasury Form 4789 (1980)):

> * * * Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

who had an interest in an air charter business, suggested that his mechanic could do the work and recommended that petitioner place a lien on the plane to prevent its forfeiture and as security for his fee. The airplane parts were moved to the site of petitioner's business, but one of Olga Thrasher's associates later moved the plane and the parts to Florida without petitioner's knowledge. Pet. App. 7-8.

2. Before trial, petitioner filed a motion to dismiss the false statement and CTR counts on the ground, *inter alia*, that the CTR statute did not provide notice that his conduct violated the CTR requirements. C.A. App. 24-25. The district court granted the motion. It found that because none of the cashier's checks that Olga Thrasher bought had a face value of more than $10,000, the bank had no duty to file CTRs. For that reason, the court concluded, petitioner could not be held criminally liable on the false statement and CTR offenses. *Id.* at 64-67.

The government took a pretrial appeal on those counts. The court of appeals reversed in an unpublished opinion and reinstated the false statement and CTR counts. The court ruled that the bank had a duty to file CTRs whenever a customer engaged in separate transactions on the same day aggregating more than $10,000, and that petitioner could be criminally liable for causing the bank to fail to file CTRs in connection with those transactions. Pet. App. 28-29.

3. During the *voir dire* of prospective jurors, the district court and counsel asked a number of questions regarding whether they knew any attorneys. C.A. App. 346-353, 363-369. Lyn Jackson, who was ultimately selected as a juror, was a television news anchor in Roanoke, Virginia. She stated that she knew a number of lawyers because she frequently covered stories about litigation. Pet. App. 12-13. She was the first prospective juror to volunteer, in response to the court's questions, that she knew de-

fense counsel and the prosecutor, Assistant United States Attorney Richard Pierce, professionally, C.A. App. 346-347; Pet. App. 14-15. Another prospective juror said he knew defense counsel socially and three others said they had served on juries in cases in which Pierce was the attorney for the government. C.A. App. 347-349. Immediately thereafter, the court asked the jurors about contacts with the United States Attorney's office and defense counsel as follows (Pet. App. 15-16; C.A. App. 349):

> All right. Well, let me say this, the fact that you may have seen someone—I'm talking more about professional or social contact on an individual basis.
>
> The fact that you have seen a name in the paper or whatever, been in the courtroom, is not the type of information I am really looking for.
>
> With that caveat, do we have any more hands?
>
> All right, have any of you had any dealings of any kind with the United States Attorney's office in Roanoke, Virginia: had any occasion to have any type of contact with the office for which Mr. Pierce works?

He received no response. C.A. App. 349. Later, Jackson replied in response to questions by the prosecutor that she knew one lawyer he mentioned by name only and that she knew a lot of lawyers. *Id.* at 365, 369. There were no follow-up questions to her statements that she knew various lawyers. She also stated that she knew about Olga Thrasher's case from news accounts but did not know specific details about the case. *Id.* at 350.

About ten days after trial, petitioner and his trial counsel learned that Jackson had been romantically involved with Assistant United States Attorney Thomas Bondurant. Bondurant was not actively involved in trial of this case but had interviewed one of the government's primary wit-

nesses. Pet. App. 12-13. Petitioner moved for a new trial on the ground that he had been denied his constitutional right to trial by an impartial jury. He claimed the information was known to the United States Attorney's office but not to him and that he could not have discovered it through due diligence. *Id.* at 13.

The district court held an evidentiary hearing at which Jackson testified that her relationship with Bondurant had ended two and a half years earlier, that it had lasted a couple of months, and that it was "not * * * serious." Pet. App. 14; C.A. App. 1989. She also testified that when the court asked about professional and social contacts with attorneys she thought she had already answered the question when she said she knew the prosecutor and that the question was directed at other jurors who had not responded. She stated that she answered all the questions as she understood them, and that she did not think of Bondurant during the questioning. She also testified that she had no prior knowledge of petitioner and had no bias against him. Pet. App. 16-17.

Bondurant testified that he talked to Jackson on the telephone occasionally but he had not seen her in more than a year. Pierce testified that he knew Bondurant and Jackson had dated but that the information had not seemed significant and he had not understood the judge to be asking about social contacts with anyone not in the courtroom. Pet. App. 17-18.

The district court denied the motion for a new trial. C.A. App. 161-171. The court found that, viewed objectively, the court's questions on voir dire sought information that Jackson failed to disclose. The court further found, however, that Jackson's failure to provide the information was not intentional but was the result of a misunderstanding or inattentiveness. The court also found that Jackson had answered the questions as she under-

stood them honestly and that she was not biased against petitioner. Pet. App. 18-19.

4. The court of appeals affirmed. Pet. App. 1-38. It held that the district court's findings that Jackson's failure to disclose her previous relationship was the result of a misunderstanding or inattentiveness and that she was not biased were not clearly erroneous. *Id.* at 20-21. The court also rejected each of petitioner's remaining challenges to his convictions, including the claim that the evidence was insufficient to support the convictions and that the prosecutor engaged in misconduct at trial. *Id.* at 25-38.

ARGUMENT

1. Petitioner contends (Pet. 12-15) that this Court should review the government's theory that it is illegal to cause a financial institution to fail to file CTRs. The same claim has been before the Court in several recent cases, and in each case the Court denied certiorari. See *Bruno* v. *United States*, 110 S. Ct. 721 (1990); *Meros* v. *United States*, 110 S. Ct. 322 (1989); *Lafaurie* v. *United States*, 486 U.S. 1032 (1988); *Perlmutter* v. *United States*, 485 U.S. 935 (1988); *Florez* v. *United States*, 484 U.S. 1060 (1988); *Giancola* v. *United States*, 479 U.S. 1018 (1986); *Heyman* v. *United States*, 479 U.S. 989 (1986). In our briefs in opposition in those cases, we noted that there has been some division among the circuits on this and related issues arising from prosecutions under Section 5313.[3] Congress, however, has recently enacted the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18, which is included as Subtitle H of the Anti-Drug

[3] We have furnished counsel with a copy of our brief in opposition in the *Bruno* case, in which we restated the arguments that we had previously made in the *Meros*, *Lafaurie*, *Perlmutter*, *Florez*, *Giancola*, and *Heyman* cases.

Abuse Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 3207. The Money Laundering Control Act was expressly designed to overrule the cases that conflict with the results reached by the court of appeals here. The new law deprives the statutory issue presented in the petition of any continuing significance. Accordingly, petitioner's claim does not warrant further review by this Court.

a. Under Section 5313 and its accompanying regulations, only financial institutions have a duty to file CTRs in connection with cash transactions. Several courts of appeals have nevertheless recognized that under 18 U.S.C. 2(b) a defendant may still be held criminally liable for causing a financial institution to violate its statutory duties. *United States* v. *Lafaurie*, 833 F.2d 1468, 1470-1471 (11th Cir. 1987), cert. denied, 486 U.S. 1032 (1988); *United States* v. *Richeson*, 825 F.2d 17 (4th Cir. 1987); *United States* v. *Heyman*, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986); *United States* v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Puerto*, 730 F.2d 627 (11th Cir.), cert. denied, 469 U.S. 847 (1984); *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). See also *United States* v. *Thompson*, 603 F.2d 1200 (5th Cir. 1979). Other courts have taken a contrary view, holding that because 31 U.S.C. 5313 and the applicable regulations do not impose on third parties a duty to file CTRs, Section 2(b) cannot be read to impose criminal liability on third parties who, by structuring their transactions, cause a financial institution to fail to file a CTR. See, *e.g.*, *United States* v. *Gimbel*, 830 F.2d 621, 624-625 (7th Cir. 1987); *United States* v. *Larson*, 796 F.2d 244 (8th Cir. 1986); *United States* v. *Reinis*, 794 F.2d 506, 508 (9th Cir. 1986); *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985).

Whatever the merit of the latter decisions in construing Section 5313, Congress has totally revised the law in this

area by enacting the Money Laundering Control Act of 1986. The explicit purpose of the new Act was to overrule the decisions in *Anzalone* and *Varbel* and to codify the decision in *Tobon-Builes*. Section 1354(a) of the Act, entitled "Structuring Transactions to Evade Reporting Requirements Prohibited," creates a new section of Title 31 (Section 5324), which provides as follows:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR as well as for structuring deposits, as petitioner did here, for the purpose of evading the reporting requirements of Section 5313. In formulating these statutory obligations, Congress made clear that its purpose was to overrule the First and Ninth Circuit decisions in *United States* v. *Anzalone*, *supra*, and *United States* v. *Varbel*, *supra*, and the Eleventh Circuit decision in *United States* v. *Denemark*, 779 F.2d 1559 (1986). The Senate Committee on the Judiciary, reporting favorably on an identical provision in S. 2683, 99th Cong., 2d Sess. (1986), an earlier version of the

money laundering bill, stated (S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986)):

> Under present law, money launderers are successfully prosecuted in some judicial circuits for causing financial institutions not to file reports on multiple currency transactions totaling more than $10,000 or causing financial institutions to file incorrect reports. In such cases, the actual money launderers are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and section 1001 (concealing from the Government a material fact by a trick, scheme, or device). For example, in *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit Court of Appeals upheld a conviction under 18 U.S.C. 1001 where the defendants had engaged in a money laundering scheme in which they had structured a series of currency transactions, each one less than $10,000 but totaling more than $10,000, to evade the reporting requirements. * * * In contrast, the First Circuit Court of Appeals, in *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985), the Eleventh Circuit Court of Appeals in *United States* v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986), and the Ninth Circuit Court of Appeals in *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986) have held that structuring currency transactions to avoid the reporting requirements did not violate 18 U.S.C. section 1001.
>
> Subsection (h) would codify *Tobin-Builes* and like cases and would negate the effect of *Anzalone*, *Varbel* and *Denemark*. It would expressly subject to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a

> required report that contains material omissions or misstatements of fact. In addition, the proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

The House intended precisely the same results when it formulated a virtually identical version of the money laundering provisions. The Committee on Banking, Finance and Urban Affairs stated (H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-19 (1986)):

> In some judicial circuits, money launderers have been successfully prosecuted for causing financial institutions not to file reports on such multiple currency transactions. In such cases, defendants are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and Section 1001 (concealing from the government a material fact by a trick, scheme, or device).[4]
>
> In contrast, other cases have held that the Act and its regulations impose no duty on the customer to inform the financial institution of the structured nature of the transactions, that the reporting duties are placed solely upon the financial institution, and therefore, only a financial institution can directly violate the reporting requirements.[5]
>
> The Committee believes that Section 2 of H.R. 5176 would resolve the legal issues raised by the various circuit courts by expresssly subjecting to potential

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[4] For this proposition, the House Report cited the Eleventh Circuit's decision in *Tobon-Builes*. H.R. Rep. No. 746, *supra*, at 18 n.1.

[5] For this proposition, the House Report cited, *inter alia*, *Anzalone* and *Varbel*. H.R. Rep. No. 746, *supra*, at 19 n.2.

> liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, it would create the offense of structuring a transaction to evade the reporting requirements, without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

In light of this new legislation, there is no reason to expect that the previous conflict among the circuits will persist. Accordingly, review by this Court is unwarranted.

b. In any event, the court of appeals' decision is correct under the law as it existed prior to the enactment of the Money Laundering Control Act of 1986.

The Court below did not address in detail the underlying question whether a third party who causes a bank to breach its reporting obligations may be held liable under Section 5313, having resolved that issue in its earlier decision in *United States* v. *Richeson, supra*. In *Richeson*, the court of appeals had held that although the duty to file CTRs is imposed only on financial institutions, a third party who causes the institution to violate its duties may be convicted under 18 U.S.C. 2(b).[6] That holding comports with the broad language of Section 2(b), which extends liability to anyone who "causes an act to be done which if directly performed by him or another would be an offense

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[6] Correspondingly, a third party who conspires to cause a bank to violate its reporting obligations may be convicted under 18 U.S.C. 371. See *United States* v. *Sans*, 731 F.2d 1521, 1530-1532 (11th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Lester*, 363 F.2d 68, 73-74 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

against the United States." As the reviser's note to 18 U.S.C. 2 states, the aiding and abetting statute

> removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.[7]

Those principles apply here as well. A bank customer's success in preventing the bank from filing CTRs cannot shield him from liability under Section 2(b). Petitioner was lawfully convicted on that basis.

Petitioner contends (Pet. 12-15), however, that by enacting the 1986 amendments to the CTR provisions—which, petitioner admits (Pet. 15), squarely apply to his conduct—Congress effectively acknowledged that the CTR provisions, as unamended, did not cover petitioner's

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[7] The reviser's note also indicates that Section 2 was intended to embrace this Court's decision in *United States* v. *Giles*, 300 U.S. 41, 43 (1937). There, the Court upheld the conviction of a bank teller under a statute that prohibited bank employees from "mak[ing] any false entry in any book * * * of [a] Federal reserve bank or member bank." The defendant was convicted of having caused a bookkeeper for the bank to make false deposit entries in the bank's ledger, by wrongfully withholding from circulation certain deposit slips prepared for particular bank customers. Although the defendant had not himself made the false entries, and although the "innocent bookkeeper was the teller's * * * unconscious agent," the Court held that "the statute [was] broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows." 300 U.S. at 48-49. So, too, for Section 2(b): it applies even where the defendant, by his actions, causes an innocent intermediary unwittingly to violate the law. Accord *United States* v. *Ruffin*, 613 F.2d 408, 412-413 (2d Cir. 1979); *United States* v. *Catena*, 500 F.2d 1319, 1322-1323 (3d Cir.), cert. denied, 419 U.S. 1047 (1974); *United States* v. *Levine*, 457 F.2d 1186, 1188-1189 (10th Cir. 1972); *United States* v. *Lester*, *supra*.

conduct in 1982. That contention is meritless. In enacting the 1986 statute, Congress took no position on which view was correct as an interpretation of the prior statute. It is often the case that when Congress resolves a conflict among the circuits, it does not necessarily mean to suggest that the position it rejects was the correct reading of prior law; as in this case, Congress often acts simply to correct confusion among the circuits, even if it regards the amended statute as consistent with the proper interpretation of the prior law. Thus, no inference can be drawn from the fact that Congress decided to clarify the Bank Secrecy Act by enacting Section 5324.

2. Petitioner contends (Pet. 6-9) that he should be granted a new trial because juror Lyn Jackson failed to disclose on *voir dire* her prior relationship with Assistant United States Attorney Thomas Bondurant and "[t]he relationship * * * is so strongly indicative of bias that a new trial is warranted." Petitioner's claim is without merit.

To obtain a new trial because of a juror's failure to respond to questions during *voir dire*,

> a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

McDonough Power Equipment, Inc. v. *Greenwood*, 464 U.S. 548, 556 (1984). Where information comes to the attention of the trial court that suggests that a juror may not be impartial, the appropriate course is to hold a factfinding hearing and determine whether the juror is actually biased, taking into consideration the testimony of the juror. *Smith* v. *Phillips*, 455 U.S. 209, 215 (1982); *Remmer* v. *United*

States, 347 U.S. 227, 228-230 (1954).[8] Here, the district court held an evidentiary hearing and concluded that Jackson had not acted dishonestly in failing to disclose her previous relationship with Bondurant, but instead had misunderstood the question. The court of appeals properly determined the district court's finding on that point was not clearly erroneous. Jackson had volunteered several answers regarding her acquaintances with lawyers and there had been no follow-up questions. When the court asked about professional or social contact with attorneys after Jackson had already volunteered answers regarding her acquaintances, the court specifically asked whether there were "any more hands." The court's question regarding contacts with the United States Attorney's office immediately followed the request for "more hands." The district court accepted Jackson's testimony that she thought she had already answered the questions and that the court was seeking answers from other jurors who had not responded.

Nor does petitioner's challenge meet the second prong of the *McDonough Power* test, that "a correct response would have provided a valid basis for a challenge for cause." Nothing in the record suggests that Jackson was biased against petitioner or in favor of the prosecution because of her brief personal relationship, ending several years earlier, with an Assistant United States Attorney

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[8] Some courts have suggested that courts should hesitate to question jurors post-trial about their personal lives absent strong evidence that a specific impropriety has occurred that could have prejudiced a defendant. See *Neron* v. *Tierney*, 841 F.2d 1197 (1st Cir. 1988) (declining to intrude on juror privacy where juror had had a relationship with a defendant's son and juror had slight contact with defendant's family); *United States* v. *Sun Myung Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984).

other than the prosecutor. That question does not merit further review.[9]

3. Petitioner next claims (Pet. 15-17) that the district court improperly excluded testimony by an attorney that petitioner's advice to Olga Thrasher regarding structuring cash transactions was consistent with the conduct expected of a reasonably prudent attorney in the area at the time.

Expert testimony is admissible if it will assist the trier of fact to understand the evidence in the case. Fed. R. Evid. 702. The district court has wide discretion to admit or exclude such testimony. *Hamling* v. *United States*, 418 U.S. 87 (1974). The district court found that the evidence proffered in this case would confuse the jury because it was inconsistent with the governing law that structuring cash transactions was unlawful. A court is not required to admit expert testimony that would contradict or undercut the district court's instructions to the jury regarding the law. *Adalman* v. *Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir. 1986); *United States* v. *Zipkin*, 729 F.2d 384 (6th Cir. 1984); *Marx & Co.* v. *Diners' Club, Inc.*, 550 F.2d 505 (2d Cir.), cert. denied, 434 U.S. 861 (1977).[10] The district court therefore did not err in excluding the evidence.

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[9] Petitioner's reliance on *Cannon* v. *Lockhart*, 850 F.2d 437 (8th Cir. 1988), is misplaced. The court in that case concluded that *McDonough Power* does not require dishonesty by the juror, but that it does require a showing of actual bias. Because both the Eighth Circuit in *Cannon* and the Fourth Circuit in this case required a showing of actual bias and found no actual bias in the cases before them, there is no conflict among the circuits that requires resolution in this case.

[10] Petitioner's reliance on *Marx & Co., supra*, is misplaced. There, the court held that an attorney was properly barred from testifying as to the legal standards that governed the contract at issue because that testimony was not only about customary practices of a trade or business but also about the applicable principles of law, and it was the judge's role to instruct on the applicable law. 550 F.2d at 508-510. See generally 7 J. Wigmore, *Evidence* § 1952 (Chadbourn rev. 1978).

4. Petitioner contends (Pet. 9-12) that he is entitled to a new trial because, he claims, the prosecutor asked a series of improper questions (*Ibid.*). The court of appeals properly rejected that contention.

At trial, the prosecutor asked petitioner a question about whether one of petitioner's planes was supposed to bring a load of marijuana from Colombia (C.A. App. 1655), and questions about petitioner's tax returns (*id.* at 1651-1652). Petitioner objected in both cases, and the objections were sustained. The prosecutor also asked a defense witness about his involvement with a politician (*id.* at 1449-1450), and petitioner's objection was sustained. In addition, the prosecutor asked petitioner a question regarding petitioner's drinking problem (*id.* at 1657), and he asked a defense witness about his contacts with drug dealers (*id.* at 1344-1345), both without objection. The prosecutor provided the court with a sealed foundation letter setting forth the foundation for his inquiries on several of those points (*id.* at 153-155).

The court of appeals held that the questions did not deprive petitioner of a fair trial. Pet. App. 25-26. The questions about petitioner's income and his possible involvement in drug dealing were relevant to the question whether petitioner's services to Olga Thrasher were purely legal or whether they were part of a scheme relating to drug dealing in which petitioner was involved. The question regarding a defense witness's involvement with a politician was interrupted by an objection before it could possibly have had any significance for the jury. The other inquiries passed without objection and could not have had a significant effect on the trial. Under the circumstances, the court of appeals was correct that petitioner suffered no unfair prejudice from the prosecutor's cross-examination of the witnesses for the defense.

5. Finally, petitioner claims (Pet. 17-20) that the evidence against him was insufficient. The court of appeals disagreed. It found "ample testimony" to show that peti-

tioner assisted in obtaining the false death certificate for Wallace Thrasher, and sufficient evidence from which the jury could infer that one of the purposes for obtaining the certificate in Jamaica was to persuade law enforcement authorities to end their investigation of the Thrashers' drug importation activities. Pet. App. 35. The court also found "extensive evidence" that petitioner had assisted Olga in secreting the drug proceeds. *Ibid.* Thus, the court concluded, the evidence was sufficient to show that petitioner acted as an accessory after the fact to the drug trafficking. The court also found the evidence sufficient to show that petitioner traveled in commerce in furtherance of the Thrashers' drug trafficking activities, *id.* at 36-38, and it summarily rejected petitioner's claim that the evidence of the CTR violations was insufficient, *id.* at 38.

The evidence showed that petitioner was instrumental in arranging to structure the cash transactions to avoid having CTRs filed, and that petitioner's services to Olga Thrasher were designed to avoid investigation of the drug offenses that had generated the assets that petitioner sought to shield from forfeiture. That evidence was amply sufficient to support petitioner's convictions on each of the crimes of which the jury found him guilty.[11]

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[11] Petitioner lists as an issue (Pet. iii) the question whether his conviction under 18 U.S.C. 1001 and 31 U.S.C. 5313 and 5322 for conduct involving the structuring of banking transactions violates the Double Jeopardy Clause, but he does not address the issue in the petition. In any case, the court of appeals correctly held that the question is controlled by this Court's analysis in *United States* v. *Woodward*, 469 U.S. 105 (1985), where the Court rejected a similar challenge to a prosecution under 18 U.S.C. 1001 and 31 U.S.C. 1058 and 1101, which relate to the failure to file reports of importation or exportation of currency. Because each statute required proof of a fact not required by the other, and because neither the text nor the legislative history of either statute indicated that Congress intended to prohibit cumulative punishment, the Court upheld the filing of charges under both statutes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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